STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
AND WORKERS' COMPENSATION APPELLATE COMMISSION

JAMES A. LOOS, JR.,

Plaintiff-Appellee,

v

J. B. INSTALLED SALES, INC., a/k/a J. B. SUPPLY and ACCIDENT FUND INSURANCE COMPANY OF AMERICA,

Defendants-Appellants,

and

ROBINSON ROOFING,

Defendant.

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LC No. 05-000246

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DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
AND WORKERS' COMPENSATION APPELLATE COMMISSION

JAMES A. LOOS, JR.,

Plaintiff-Appellee,

v

ROBINSON ROOFING,
Uninsured,

Defendant-Appellee,

and
J. B. INSTALLED SALES, INC. and
ACCIDENT FUND INSURANCE COMPANY
OF AMERICA,

Defendants-Appellants.
_____/

S.C. NO.:

C.A. NO.: 275704

L.C. NO.: WCAC 05-000246

DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

Defendants-Appellants, J. B. Installed Sales, Inc. and Accident Fund Insurance Company of America, apply to this Court for leave to appeal, stating as follows:

STATEMENT OF FACTS

(Numbers in parentheses refer to the pages of the trial transcript of May 31, 2005, which is mislabeled on the cover sheet of the transcript as May 31, "2004," unless otherwise indicated. Numbers preceded by "N" refer to the pages of the deposition of Dr. Nowinski. Numbers preceded by "B" refer to the pages of the deposition of Dr. Buszek.)

This case presents the sole question of whether plaintiff, a roofer, was an employee or an independent contractor of Robinson Roofing. (Commission's opinion, p 4).

Robinson Roofing was a subcontractor of the general contractor who is defendant-appellant, J.B. Installed Sales, Inc. (Commission's opinion, pp 1-2). Robinson Roofing's owner (William Robinson) told defendant-appellant that Robinson Roofing had no employees, but – should Robinson Roofing later hire any employee(s) – Robinson Roofing would "maintain workers' compensation insurance" for them. (Commission's opinion, p 2).

The underlying facts are not in dispute. The Workers' Compensation Appellate Commission found the trial Magistrate had "accurately summarize[ed] the evidence." (Commission's opinion, p 2). The Appellate Commission quoted that evidence as follows:

> After accurately summarizing the evidence, the magistrate made the following relevant findings:
>
> > Plaintiff, in the brief filed post-trial, argues that he was an employee for Robinson Roofing. Plaintiff argues that Robinson Roofing is an uninsured subcontractor of J B Installed Sales/J B Supply Company, Inc., the remaining Defendant in this case. Section 171 of the Act provides that if a contractor is not insured, an injured employee of the contractor may seek compensation from the principle [*sic*]. Therefore, if, this Court found that Plaintiff is an employee of Robinson Roofing, then Plaintiff could "shoot through" to the general contractor, that being Defendant. However, the evidence presented in this case does not support Plaintiff's position that he was an employee of Robinson Roofing. The most relevant exhibit having to do with this particular issue is Exhibit B. In those tax records, are two Form 1099's. Plaintiff reports to the IRS that he earned $4,328.57 from William Robinson, and that it was "non employee compensation". Plaintiff also had non-employee compensation wages paid by Above Board Roofing Contracting also in 2003. This Court would agree with Defendant's position in their brief that tax records demonstrating two employers, along with W-2's in the year 2003, other than Robinson Roofing and Above Board Roofing demonstrates that Plaintiff certainly was employed by two

separate employers in 2003. However, William Robinson was not one of the employers. Had Plaintiff been an employee of Robinson Roofing, he would have been paid on a W-2, just as he was with Local Roofing, Inc. and Mid-Michigan Roofing. Additionally, the Social Security Administration records do not list wages earned from Robinson Roofing, and this omission the Social Security records certainly points toward Plaintiff not being an employee of Robinson Roofing.

Additionally, when Plaintiff presented to Genesys Hospital on November 19, 2003, Plaintiff is listed as being self-employed. Although an emergency contact is listed as Bill Robinson, he is not listed as the employer. This also goes against Plaintiff's position that he is an employee of Robinson Roofing.

Additionally, Exhibit D contains a sworn statement for sole proprietorship signed by William Robinson, III on July 15, 2003. According to that statement, William Robinson, III represented that he is a sole proprietor and has no employees. It also indicates that if he hires employees, he would notify J B Installed Sales. I found the testimony of Deb Millay to be credible with respect to the fact that J B Supply Company was never notified about William Robinson having employees.

Although Plaintiff argues in his brief that he does not maintain a separate business as a roofer, the records presented clearly establish that he is a self-employed roofer. Although he was employed by two entities according to tax records, he was not employed by at least two others, but did roofing work as a "non employee". Further, he did use at least some of his own tools while in the course of doing that work.

Although Plaintiff testified at trial about an employee of J B Supply Company telling him what to do, there is simply no evidence presented to establish that Defendant J B Supply Company was an employer of Plaintiff's pursuant to MCL 418.161(n). Plaintiff was never paid by J B Supply

> Company, nor did he sign any contract with J B Supply Company. It is clear from the evidence presented that William Robinson was working for J B Supply as a subcontractor. William Robinson, in turn paid Plaintiff, who was a self employed independent contractor with William Robinson. Therefore, Plaintiff's claim fails under Section 161(n) as it applies to both William Robinson and Defendant J B Supply Company. Because Plaintiff has not met his burden of proving that he was employee of Robinson Roofing, then Section 171 becomes moot. As well, for the reasons set forth above, Plaintiff clearly has not established that J B Sales is his direct employer. Therefore, although Plaintiff has established a significant injury, which has resulted in disability, he does not have an employer, either in fact or statutorily. Therefore, Plaintiff's application for benefits must be denied. [Magistrate's opinion, pp 15-17.] (Commission's opinion, pp 2-4).

Plaintiff appealed the trial Magistrate's decision to the Workers' Compensation Appellate Commission. The Appellate Commission reversed the Magistrate, found plaintiff to be an "employee" of Robinson Roofing, and then held defendants-appellants liable, under MCL 418.171, because of Robinson Roofing's lack of workers' compensation insurance. (Commission's opinion, pp 5-6).

Defendants-Appellants applied to the Court of Appeals for leave to appeal. In an order entered August 17, 2007, the Court of Appeals denied the application. Defendants-Appellants applied for leave to appeal to this Court. This Court entered an order on December 20, 2007 remanding the case to the Court of Appeals as on leave granted. *Loos v J. B. Installed Sales, Inc*, 480 Mich 990; 742 NW2d 125 (2007).

The Court of Appeals then – after foregoing oral argument – issued an unpublished opinion, entered November 20, 2008 (Judges Murphy, Sawyer, and Smolenski). In

that opinion, the Court of Appeals affirmed the Appellate Commission's finding that plaintiff was an "employee" of Robinson Roofing.

Defendants-Appellants now apply to this Court for relief on the following bases.

ARGUMENT I

THE COURT OF APPEALS HAS CONSISTENTLY HELD THAT "DECISIVE EVIDENCE" FOR DETERMINING WHETHER A WORKERS' COMPENSATION CLAIMANT IS AN "EMPLOYEE" UNDER § 161(1)(n) IS THE CLAIMANT'S INCOME TAX FORMS. THIS RULE APPLIED EVEN THOUGH THE STATUTE NEVER MENTIONED INCOME TAX RECORDS. INCOME TAX RECORDS WERE VIEWED AS THE EVIDENTIARY MEANS BY WHICH A CLAIMANT DOES OR DOES NOT SATISFY THE STATUTORY CRITERIA OF "EMPLOYEE." IN THIS CASE, THE COURT OF APPEALS ABANDONED ITS RULE. IT HOLDS THAT THE TRIAL MAGISTRATE'S "RELIANCE ON SUCH [INCOME TAX] FACTORS TO DETERMINE WHETHER PLAINTIFF WAS AN 'EMPLOYEE' WAS IMPROPER" BECAUSE IT WAS "NOT INCORPORATED INTO" THE STATUTE. THIS COURT SHOULD REVERSE THE COURT OF APPEALS' BREAK FROM ITS OWN WELL-ESTABLISHED METHOD OF RESOLVING THIS QUESTION.

The Court's **standard of review** requires determination whether the decisions below reflect legal error. Const 1963, art 6, § 28; MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 732; 614 NW2d 607 (2000). Here, the Court of Appeals has erred by crafting a new and legally errant rule for determining the method by which the factfinders determine who is and who is not an "employee" under the criteria recited in MCL 418.161(1)(n). The Court should reverse the Court of Appeals and Workers' Compensation Appellate Commission and reinstate the trial Magistrate's decision.

A. The Statute.

The primary statute at issue is MCL 418.161(1)(n)[1] which defines "employee" for workers' compensation purposes as:

> As used in this act, "employee" means:
>
> * * *
>
> (n) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.

"Thus, each provision must be satisfied for an individual to be an employee." *Amerisure Insurance Companies v Time Auto Transportation, Inc*, 196 Mich App 569, 574; 493 NW2d 482 (1992); see also, *Blanzy v Brigadier General Contractors, Inc,* 240 Mich App 632; 613 NW2d 391 (2000); *Luster v Five Star Carpet Installations, Inc*, 239 Mich App 719; 609 NW2d 859 (2000).

B. The Evidentiary Means Used To Apply This Statutory Criteria.

The Court of Appeals has frequently addressed the type of evidence that illuminates whether a workers' compensation claimant "maintain[s] a separate business," or whether the claimant "hold[s] himself or herself out to and render service to the public" for § 161(1)(n) purposes. The Court of Appeals has said the "decisive evidence" is how the claimant described himself or herself to the federal government – under the penalty of law, 26 USC § 6065 – on income tax forms. *E.g.*, *Gray v Kroll Construction, Inc*, CA Docket No. 235717, unpublished opinion rel'd November 26, 2002, slip op at p 4 (attached).

[1] As the Court will see, in some cases from the Court of Appeals this statute is referred to as MCL 418.161(1)(d) due to the different, old numbering within MCL 418.161. The statutory criteria at issue in this case has remained constant, however, despite the change in numbering.

Among the cases making this point over the last approximately nine years are the following.

In *McCaul v Modern Tile and Carpet, Inc*, 248 Mich App 610; 640 NW2d 589 (2001), the Court of Appeals affirmed the finding that the claimant was not an employee because he maintained a sole proprietorship and, thus, held himself out to and rendered service to the public under § 161(1)(n). The Court of Appeals' opinion turned on evidence of how the employing entity had paid plaintiff and how plaintiff reported his income on federal income forms. *McCaul* explained:

> In considering whether plaintiff was defendant's employee, both the magistrate and the WCAC considered the factors set forth in subsection 161(1)(d). Specifically, the WCAC rejected plaintiff's claim for benefits against defendant because there was ample record support for the magistrate's factual determination that plaintiff maintained a separate carpet installation business. ... [W]e agree with the WCAC's determination that plaintiff was not an employee as defined by subsection 161(1)(d) because he operated a sole proprietorship. For example, defendant did not pay plaintiff as an employee because defendant did not withhold money from plaintiff's paycheck for taxes. *Luster*, *supra* at 727. Rather, plaintiff was paid as an independent contractor who ran his own business, where defendant provided plaintiff with a Form 1099 annually and his income was not reported on a Form W-2. *Id.* *McCaul*, 248 Mich App at 617.

In *Luster*, *supra*, the Court of Appeals similarly affirmed a denial of benefits on the basis the claimant was not an "employee" under the governing statutory criteria, *i.e.*, that plaintiff maintained his own business, because the "magistrate [had] based his finding on the facts that plaintiff filed a profit and loss statement with the IRS," as well as other evidence. *Luster*, 239 Mich App at 723 (bracketed word is defendants'). *Luster* explained:

> ... we are satisfied that the magistrate's finding that plaintiff was not an employee, but an independent contractor, was fully consistent with subsection 161(1)(d) as applied under *Hoste*. Substantial evidence on the record established that plaintiff

> maintained his own business and therefore was not an employee under the first condition stated in subsection 161(1)(d). Defendant did not pay plaintiff like an employee—defendant did not withhold money from plaintiff's check for taxes and did not issue plaintiff a W-2 form at the end of the year. Instead, defendant paid plaintiff as an independent contractor who ran his own business, e.g., defendant supplied plaintiff with an IRS Form 1099 each year. *Luster*, 239 Mich App at 727.

In *Blanzy*, *supra*, the Court of Appeals – reversing the Appellate Commission and reinstating the trial Magistrate's denial of benefits – was emphatic that the claimant was not an "employee" based "primarily" on plaintiff's method of paying taxes. *Blanzy*, 240 Mich App at 642. *Blanzy* said:

> The magistrate found that plaintiff ran his own business in relation to HCM's [the alleged employer's] services. Her finding was primarily based on plaintiff's method of paying taxes. Plaintiff and his accountant testified regarding plaintiff's individual tax returns and those for HCM for the years 1988 through 1990. The corporate returns do not list wages or salaries paid or compensation to officers, but list payments for subcontractor services. On his federal taxes, plaintiff reported both wages and business income, and he identified his business as heating and air conditioning. Plaintiff's accountant testified that a portion of the subcontractor services reported by HCM was paid to plaintiff and reported on his individual income tax return as part of his business income. ...
>
> We find that this constitutes substantial evidence for the magistrate's finding that plaintiff ran his own business, and that the WCAC should have deferred to his finding. *Blanzy*, 240 Mich App at 642-643 (bracketed words are defendants').

In *Gray*, *supra*, the Court of Appeals again addressed the correct evidentiary means for applying § 161's criteria. *Gray* said a factfinder's reliance on income tax forms is "decisive evidence." *Gray*, *supra*, slip op at p 4. *Gray* also noted how the Appellate

Commission had traditionally relied upon this evidence as the correct means for applying § 161's statutory criteria.[2] The *Gray* Court said:

> In holding that plaintiff was an independent contractor, the WCAC considered as decisive evidence plaintiff's tax returns from the two years preceding the injury which indicated that plaintiff declared business income and paid self-employment taxes. The WCAC relied on *Blanzy*, *supra*, and *Betancourt v Ronald Smith*, 1999 ACO 608, to support its reversal of the magistrate's decision. *Gray*, *supra*, slip op at p 4.

Gray discussed *Blanzy*, *McCaul*, both *supra*, and *Betancourt v Ronald Smith and Farm Bureau Insurance Co*, 1999 ACO #608, and characterized tax reporting as "dispositive":

> In this case, the WCAC reversed the magistrate's award of benefits primarily because it considered the information contained on plaintiff's tax returns dispositive of the issue whether plaintiff maintained a separate business. In particular, plaintiff filed individual tax returns and Schedule C, Profit and Loss from Business (Sole Proprietorship), forms which indicated income derived solely from his business, from which he claimed deductions, and for which he paid self-employment taxes. In light of the prevailing case law on this issue, we agree that plaintiff's tax records were very persuasive factors in support of the conclusion that plaintiff was an independent contractor for defendant. *Gray*, *supra*, slip op at p 5 (emphasis is defendants').

Therefore, the law is clear that the evidentiary means by which the factfinder is to determine whether the claimant maintains a separate business or holds himself or herself out to and render service to the public under § 161 depends on how the employee reports his or her income and how the claimant is paid. The Court of Appeals abandoned this rule in this case.

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[2] For example, the Appellate Commission has said:

> ... whether an employee maintains a separate business can be answered to a great extent by reference to plaintiff's tax records and whether plaintiff treats his income as wages or business income. In this case plaintiff treated his earnings as business income. *Koons v Amre Cabinet Refacing, Inc*, 2000 ACO #235.

See also, *Gray v Kroll Construction, Inc*, 2001 ACO #244; *Betancourt v Ronald Smith and Farm Bureau Insurance Co*, 1999 ACO #608.

C. The Court of Appeals Holds Reliance On Income Tax Forms "Was Improper" Because Income Tax Forms Are Not Explicitly Mentioned In § 161(1)(n).

Here, the Court of Appeals rejects the rule articulated in its own cases. The Court of Appeals held:

> We agree with the Commission that the focus of the magistrate's analysis was misplaced. For example, the magistrate considered plaintiff's tax records to be "most relevant." However, factors such as whether taxes were withheld or whether plaintiff was issued a Form 1099 or a W-2 were not incorporated into MCL 418.161(1)(n), and, therefore, reliance on such factors to determine whether plaintiff was an "employee" was improper. *Hoste*, *supra*; *Reed*, *supra*. The statutory factors must be the focus of the analysis. Thus, the Commission did not err when it concluded that the magistrate's analysis was legally flawed. The Commission properly re-focused the analysis on the statutory factors, and the evidence relevant to those factors. Because the Commission did not misapprehend its administrative appellate role and gave an adequate reason grounded in the record for reversing the magistrate, and because there is evidence in the record to support the Commission's findings, we must affirm. See *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 703-704; 614 NW2d 607 (2000). (Court of Appeals' slip op at p 2).

If it was "improper" for the Magistrate in this case to rely upon "factors such as whether taxes were withheld or whether plaintiff was issued a Form 1099 or a W-2" because that type of evidence was "not incorporated into MCL 418.161(1)(n)," then it was likewise improper for the factfinders in all of the cases described earlier to have relied upon income tax forms. Yet, the above cases make clear that not only was it *not* "improper" for a Magistrate to rely on tax records, the tax records were – to the contrary – the "decisive evidence," "dispositive of the issue," and the "very persuasive" factor. Here, the Magistrate found the income tax reporting "'most relevant.'" (Court of Appeals' slip op at p 2). It was not "improper" for the Magistrate to so find. (Court of Appeals' slip op at p 2). To the contrary, "[i]n light of the prevailing case law on this issue," it would have been improper to not have viewed the income tax records as the

"'most relevant'" evidentiary proofs as to whether or not the claimant meets § 161's statutory criteria. And, importantly, defendants in this case defended plaintiff's claim of being an employee "[i]n light of the prevailing case law on this issue," *i.e.*, primarily relying on income tax reporting. Defendants are now, in effect, being told by the Court of Appeals after-the-fact: the rules have changed.

D. Conclusion.

The Court of Appeals in this case has stood established case law on its head. Rather than applying the prevailing case law speaking on the proper evidentiary means for applying § 161, the Court has held it is "improper" for the Magistrate to apply the "prevailing law." The Court should reinstate the trial Magistrate's order as correctly reflecting the governing rule. In the alternative, the Court should grant leave to resolve the break from authority represented by the Court of Appeals in this case.

ARGUMENT II

BESIDES PLAINTIFF'S INCOME TAX FORMS, THERE WAS OTHER EVIDENCE RELIED UPON BY THE TRIAL MAGISTRATE FOR HIS CONCLUSION. NEITHER THE COURT OF APPEALS NOR THE WORKER'S COMPENSATION APPELLATE COMMISSION RESPECTED THE MAGISTRATE'S RELIANCE ON THAT EVIDENCE. SUCH RESPECT IS MANDATED BY THE APPLICABLE APPELLATE REVIEW STANDARDS.

Income tax records were not the only evidence of plaintiff's status. The trial Magistrate so found. The Workers' Compensation Appellate Commission has exceeded and misapprehended its appellate role in displacing the trial Magistrate's preference for that evidence. The Appellate Commission's overreach and misapprehension of its appellate role is a legal error. *Mudel*, 462 Mich at 700, 732.

A. Background.

Some background on the interplay of § 161 and § 171 of the workers' compensation statute is worthwhile for understanding this case. In order to successfully claim benefits under the Worker's Disability Compensation Act, a workers' compensation claimant bears the burden of proving that he or she is an "employee" of some entity in the case because workers' compensation benefits are only available to "employees." MCL 418.161 and MCL 418.301(1). "Employees" are defined in the Worker's Disability Compensation Act. The definition pertinent for purposes of this case is the one quoted in preceding Argument. Plaintiff bore the burden of proof of proving he was an "employee" under § 161(1)(n). MCL 418.851 [second sentence].[3]

[3] MCL 418.851's second sentence provides: "A claimant shall prove his or her entitlement to compensation and benefits under this act by a preponderance of the evidence."

Under § 161, a person can maintain a separate business – and, thus, not be covered by the workers' compensation statute – even if the person does not employ anyone else. The prime example is a person maintaining a business as a sole proprietor. As a sole proprietor, the person is holding himself or herself out to and rendering service to the public. *Black's Law Dictionary* defines sole proprietorship as: "**1.** A business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity. **2.** Ownership of such a business." *Black's Law Dictionary*, Seventh Edition, p 1398 (1999). Professor Edward Welch discusses sole proprietorship in *Worker's Compensation in Michigan: Law & Practice*, Third Edition, §3.5, p 3-5 (2001), saying:

> A self-employed person or the owner of a business that is a sole proprietorship is not an employee and is not subject to the Act. Basically, any business that is not a partnership or a corporation is a sole proprietorship. A sole proprietorship may have employees, but the person who owns the business is not one of them. *McCaul v Modern Tile & Carpet, Inc*, 1999 Mich ACO 629, 13 MIWCLR 1251 (1999). Welch, *supra* at §3.5, p 3-5.

A person who is a sole proprietor is, therefore, someone who is not an "employee" entitled to claim workers' compensation business. *E.g.*, *McCaul*, 248 Mich App at 612-613.

Plaintiff made a passing effort at trial to claim he was an employee of the instant defendant-J. B. Installed Sales, but that claim was rejected by both the Magistrate and the Appellate Commission. (Commission's opinion, quoting Magistrate's opinion, p 3 and p 6). It is no longer at issue. The argument plaintiff did successfully press before the Appellate Commission was that he was an "employee" of the subcontractor, Robinson Roofing. And, since Robinson Roofing did not have workers' compensation coverage for its employees, the defendant-employer (the general contractor or principal) would be held liable pursuant to MCL

418.171.[4] Section 171(1) is sometimes called the "shoot through" (or "statutory-principal") provision of the Worker's Disability Compensation Act. It permits someone who is an employee of an uninsured subcontractor to "shoot through" that uninsured employer to reach an insured general contractor to obtain a workers' compensation remedy.

It is this shoot through/statutory-principal provision under which the instant defendant-J. B. Installed Sales has been held liable in this matter. Defendant-J. B. Installed Sales does not contest operation of § 171(1) in a general sense. But, it is important for the Court to appreciate that a workers' compensation claimant must be an "employee" of the uninsured subcontractor in order for the claimant to pursue the shoot through remedy of § 171.

B. Plaintiff's Income Forms Were Not The Only Evidence Supporting The Trial Magistrate's Factual Conclusion.

With that in mind, the income tax reporting of plaintiff (to the IRS) and defendant's method of payment and reporting to plaintiff (*e.g.*, no withholding, Form 1099) showed plaintiff neither saw himself as an employee, nor did defendant-J. B. Installed Sales view him as one. But, besides income tax and withholding, there was other evidence. One would not know this from the Court of Appeals' opinion because it suggests plaintiff's income tax forms were the only evidence the trial Magistrate relied upon for his conclusion plaintiff was a sole proprietor who maintained his own business. But, plaintiff's social security records were also

[4] MCL 418.171(1) provides: "If any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act or who has not complied with the provisions of section 611, and who does not become subject to this act or comply with the provisions of section 611 prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal. If compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the person under the employer by whom he or she is immediately employed. A contractor shall be deemed to include subcontractors in all cases where the principal gives permission that the work or any part thereof be performed under subcontract."

entered into evidence. (Defendants-Appellants' Exhibit D). Those social security records corroborated plaintiff's description of himself on his Internal Revenue Service forms. The social security records reveal no employee wages paid to plaintiff by Robinson Roofing. (Defendants-Appellants' Exhibit D). The trial Magistrate said: "the Social Security Administration records do not list wages earned from Robinson Roofing, and this omission [from] the Social Security records certainly points toward Plaintiff not being an employee of Robinson Roofing." (Magistrate's decision, p 16, quoted at p 3 of the Commission's opinion).

Other important evidence was to the same effect. The owner of Robinson Roofing, the alleged immediate employer of plaintiff, had signed an affidavit contemporaneous with the events at issue saying he had "no employees" and "[i]f it becomes necessary to hire employees to assist me in my work, I will immediately notify JB INSTALLED SALES [defendant-appellant]." (Defendants-Appellants' Exhibit D). No indication of hiring any employees was forthcoming from Robinson Roofing. The Magistrate believed this evidence.

Further evidence was the fact that "when Plaintiff presented to Genesys Hospital on November 19, 2003 [the date of his injury], Plaintiff is listed as being self-employed" and Robinson "is not listed as the employer. This also goes against Plaintiff's position that he is an employee of Robinson Roofing." (Magistrate's decision, p 16, quoted at p 3 of the Commission's opinion; bracketed material is defendants'). In *Gray*, *supra*, (and here at the Magistrate level) this type of hospital entry representation, along with income tax representations, resolved the question.

Other evidence included plaintiff using some of his "own tools while in the course of doing that work" for Robinson Roofing. (Magistrate's decision, p 16, quoted at p 3 of

the Commission's opinion). In *McCaul, supra*, (and here at the Magistrate level) this point, along with income tax representations, resolved the question.

Finally on this point is the trial Magistrate's astute observation on how plaintiff characterized himself as an "employee" when he worked for certain concerns in 2003 and how he characterized himself as a sole proprietor in 2003 when working for defendant-J. B. Installed Sales. This demonstrated plaintiff knew the difference. Specifically, plaintiff's income tax returns drew a bright line differentiation between wages he earned as an employee (on W-2 forms) and his miscellaneous business income as a non-employee (on Form 1099s). The Magistrate recognized this "most relevant" distinction, saying:

> The most relevant exhibit having to do with this particular issue is Exhibit B. In those tax records, are two Form 1099's. Plaintiff reports to the IRS that he earned $4,328.57 from William Robinson, and that it was "non employee compensation". Plaintiff also had non-employee compensation wages paid by Above Board Roofing Contracting also in 2003. ... tax records demonstrating two employers, along with W-2's in the year 2003, other than Robinson Roofing and Above Board Roofing[,] demonstrates that Plaintiff certainly was employed by two separate employers in 2003. However, William Robinson was not one of the employers. Had Plaintiff been an employee of Robinson Roofing, he would have been paid on a W-2, just as he was with Local Roofing, Inc. and Mid-Michigan Roofing. (Magistrate's decision, pp 15-16, quoted at p 3 of the Commission's opinion).

Therefore, there was plentiful record evidence to support the Magistrate.

C. The Court of Appeals And Appellate Commission Did Not Respect The Magistrate's Determination Of The Factual Question.

The Court is charged with "ensur[ing] the integrity of the administrative review process" in workers' compensation. *Mudel*, 462 Mich at 701. That includes "ensur[ing] that the WCAC did not misapprehend its administrative appellate role in reviewing decisions of the magistrate." *Mudel*, 462 Mich at 732. The Appellate Commission "misapprehend[s] its

administrative appellate role" when it engages in *de novo* review. *Mudel*, 462 Mich at 700. Rather than *de novo* review, the Appellate Commission's review of fact questions is limited to determining whether the trial Magistrate's preference for certain evidence is a preference "a reasonable mind will accept as adequate to justify the conclusion" reached by the Magistrate. MCL 418.861a(3). This confinement of the Appellate Commission's review of facts and this definition of what constitutes substantial evidence supporting the Magistrate's decision is set by statute. Those statutes were summarized in *Mudel* as follows:

> The WCAC treats the magistrate's findings of fact as conclusive "if supported by competent, material, and substantial evidence on the whole record." MCL 418.861a(3); MSA 17.237(861a)(3).
>
> "[S]ubstantial evidence" means "such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion." MCL 418.861a(3); MSA 17.237(861a)(3). *Mudel*, 462 Mich at 732.

As explained above, the Magistrate in this case considered the whole record and found the most reliable evidence to be plaintiff's Internal Revenue Service records, plaintiff's Social Security Administration records, plaintiff's statements given upon entry to a hospital, an affidavit of the owner of Robinson Roofing, and testimony of defendant's financial recordkeeper. This evidence was all to the effect that plaintiff was *not* an employee but rather a non-employee, *i.e.*, an independent contractor, in relation to Robinson Roofing. (Commission's opinion, pp 3-4).

On review, the Appellate Commission preferred instead plaintiff's testimony where he said he neither maintained a separate business, nor held himself out to render service to the public. (Commission's opinion, p 5). The Appellate Commission said plaintiff's testimony is the "**only** competent evidence" on point. (Commission's opinion, p 5; bolding is defendants'). As already shown, this is clearly incorrect. And, the Appellate Commission implicitly concedes

it is incorrect because in the next sentence it recognizes that the testimony of a financial recordkeeper was to the contrary. And, in the following paragraph, the Appellate Commission concedes plaintiff's federal tax forms and the federal government's social security earnings reports also demonstrate the contrary. (Commission's opinion, pp 5-6).

The Appellate Commission cannot legitimately say that, while the trial Magistrate relied upon certain substantial factual evidence, the Commission prefers other evidence and reverse on that factual point. This conclusion **most especially** follows where the courts have explicitly told the Appellate Commission, under remarkably similar circumstances, a trial Magistrate's reliance on federal income tax forms and social security reporting forms "constitutes substantial evidence for the magistrate's finding that plaintiff ran his own business, **and that the WCAC should have deferred to this finding**." *Blanzy*, 240 Mich App at 643 (bolding is defendants').

The Court of Appeals in reviewing the Appellate Commission's opinion did not address in any way the trial Magistrate's reliance upon evidence other than the tax records. Contrary to the Court of Appeals' cursory review of the record, it was not as if plaintiff's tax records were the *only* evidence supporting the trial Magistrate's conclusion.

The following points must be noted about the Appellate Commission's analysis as well.

First, the Appellate Commission vigorously proceeds from a premise that it should not be bound by "the parties put[ting] labels on the relationship." (Commission's opinion, p 4). The Magistrate did not assign labels to plaintiff's status and then proceed to a result. Plaintiff characterized himself, under the penalty of federal law, as an independent contractor. And, social security wage reports supported his self-description. One cannot

legitimately fault the Magistrate for accepting plaintiff's self-description after – not before – examining the substantial evidence.

Second, the Appellate Commission implies the Magistrate had to accept plaintiff's testimony over his income tax and social security forms. That is legally incorrect because the weight of testimony is for the workers' compensation trier of fact to weigh, not to blindly accept. *Kido v Chrysler Corp*, 1 Mich App 431, 433; 136 NW2d 773 (1965) ["Plaintiff's testimony as to reporting the alleged accident was unrebutted but also unsupported. The fact that the board rejected the testimony does not constitute any irregularity in the review process as conducted by the board but, indeed, is inherent in the nature of the process."]. A Magistrate is free to reject any person's testimony. See, *Louwaert v D. Graff & Sons*, 256 Mich 387, 388; 240 NW 44 (1932); see also, *Alexander v Covel Manufacturing Co*, 336 Mich 140, 144; 57 NW2d 324 (1953). From its very first decision the Appellate Commission has historically recognized this. *McAuliff v Cambridge Nursing Center*, 1988 ACO #1. And, the Appellate Commission has been consistent on this point. In *Manley v Norcraft Co/Robinson Wood Products*, 2002 ACO #57, the Appellate Commission explained:

> The magistrate is not obligated to accept any witness' testimony as dispositive. Even unrebutted testimony must satisfy the legal burden of proof. All testimony must be weighed within the full record. *Fergus v Chrysler Corp*, 67 Mich App 106 (1976); *Kido v Chrysler Corp*, 1 Mich App 431 (1965); *Cebula v Jones Transfer*, 1992 ACO #135. *Manley, supra*, slip op at p 4.

See also, *Kobylski v Ford Motor Co*, 2005 ACO #286; *Stallings v Fenton Heading (Ring Screw Works)*, 2002 ACO #296.

More telling than how a person labels himself in his workers' compensation trial, when trying to obtain workers' compensation benefits, is how he represented his status to the federal government when not pursuing a workers' compensation remedy (and seeking tax

advantages). At least, that is what the Magistrate thought crucial. No one can legitimately say such a conclusion is one "a reasonable mind will [not] accept as adequate to justify the conclusion" that plaintiff was not an "employee" of Robinson Roofing. MCL 418.861a(3).[5] The Appellate Commission disagrees to the point of chastising defendants-appellants for not offering *more* lay evidence beyond plaintiff's tax forms and the other evidence defendants-appellants did proffer, as if defendants bore the burden of proof when defendants do not. (Commission's opinion, pp 5-6). See, MCL 418.851 [second sentence].

Third, the Appellate Commission mentions that plaintiff was not pursuing other jobs at the time of his injury. His income tax forms told a different story. (Magistrate's decision, pp 15-16, quoted at p 3 of the Commission's opinion). Plaintiff worked for at least four different concerns in 2003. (Magistrate's decision, pp 15-16, quoted at p 3 of the Commission's opinion; defendants' Exhibit B). In any event, it is not at all unusual for contractors to work at one job at a time when that job fully occupies his or her time. Mr. Blanzy did "[m]ost, if not all" his work for one company; that did not make him an "employee." *Blanzy*, 240 Mich App at 634-635.

Finally, the Appellate Commission says that it is plaintiff's actions that matter. *All* of plaintiff's actions matter. That includes his actions in representing his income to the federal government under penalty of law. His actions in distinguishing on federal income tax forms between those business entities for whom he had worked as an "employee" and those where he did not. (Defendants-Appellants' Exhibit B). Plaintiff's actions in checking into the hospital matter, plaintiff's social security records matter, plaintiff's lack of withholding taxes in

[5] MCL 418.861a(3) provides: "Beginning October 1, 1986 findings of fact made by a worker's compensation magistrate shall be considered conclusive by the commission if supported by competent, material, and substantial evidence on the whole record. As used in this subsection, 'substantial evidence' means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion."

his checks matter too. The salient point is the Magistrate chooses what "matters" most to him. The Magistrate's choice should be been respected. It was not.

RELIEF

WHEREFORE, defendants-appellants, J. B. Installed Sales, Inc. and Accident Fund Insurance Company of America, respectfully request that the Supreme Court reverse the Court of Appeals and Workers' Compensation Appellate Commission and reinstate the order of the Magistrate. If not, defendants submit the Court should grant leave to address the conflict in the Court of Appeals on the evidentiary significance of income tax reporting.

Respectfully submitted,

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